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No. 10-383

In the
Supreme Court of the United States

NIBCO, INC.,

PETITIONER,

v.

MARTHA RIVERA, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Court Should Grant Plenary Review To Clarify When A Comparative-Juror Analysis Is Required On Appeal 2

II. The Court Should Summarily Reverse The Decision To Order A New Trial. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky,
476 U.S. 79 (1986) 1, 11

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 2

Hernandez v. New York,
500 U.S. 352 (1991) 8, 11

Hightower v. Terry,
459 F.3d 1067 (11th Cir. 2006) 6

Jenkens & Gilchrist v. Groia & Co.,
542 F.3d 114 (5th Cir. 2008) 11

Kesser v. Cambra,
465 F.3d 351 (9th Cir. 2006) (en banc) 4, 8

Kontrick v. Ryan,
540 U.S. 443 (2004) 6

Lamon v. Boatwright,
467 F.3d 1097 (7th Cir. 2006) 6

Lockyer v. Andrade,
538 U.S. 63 (2003) 3

Miller-El v. Dretke,
545 U.S. 231 (2005) ..... *passim*

Reed v. Quarterman,
555 F.3d 364 (5th Cir. 2009) 11

Reynoso v. Hall,
No. 08-15800,
2010 WL 3516410 (9th Cir. Sept. 7, 2010) 3, 4

Snyder v. Louisiana,
552 U.S. 472 (2008) 7, 8

United States v. Brown,
553 F.3d 768 (5th Cir. 2008) 6

United States v. Cecil,
615 F.3d 678 (6th Cir. 2010) 5

United States v. Katuramu,
Nos. 04-3633, 04-3722,
2006 WL 773038 (6th Cir. Mar. 28, 2006) 5

United States v. Martinez,
621 F.3d 101 (2d Cir. 2010) 2

United States v. Torres-Ramos,
536 F.3d 542 (6th Cir. 2008) 5

United States v. Williams,
610 F.3d 271 (5th Cir. 2010) 6

Woodward v. Epps,
580 F.3d 318 (5th Cir. 2009) 5

REPLY BRIEF

The Ninth Circuit below vitiated a 7-week trial without the courtesy of a remand by second-guessing a trial court's findings under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on new arguments and evidence raised for the first time on appeal. Respondents' opposition tries to sow confusion, denying that the Ninth Circuit's decision is an outlier and that lower courts are divided over when comparative-juror analysis is required. But respondents' arguments disintegrate on examination. The Ninth Circuit has squarely held, in both the decision below and in a prior *en banc* case, that comparative-juror analysis is mandatory and that comparative-juror arguments are exempt from ordinary rules of forfeiture. That position conflicts with approaches taken by other courts of appeals. And it cannot be reconciled with this Court's precedents, which have warned of the dangers of appellate fact-finding and emphasized that trial court *Batson* determinations should be reviewed only for "clear error." The Court's intervention is needed to correct the Ninth Circuit's doctrinal departures and to provide much-needed guidance to the lower courts.

More fundamentally, respondents' opposition confirms that, at a minimum, the Court should summarily reverse the Ninth Circuit's decision to order a new trial without remanding for the trial court to consider the new arguments and evidence raised for the first time on appeal. Contrary to respondents' assertions, the issues are far from undisputed. A remand is thus required for the trial judge, who is best-positioned to conduct *Batson*'s

fact-intensive, credibility-based inquiry, to determine whether, as respondents assert, petitioner's counsel purposefully discriminated when striking prospective juror TG or whether, as petitioner maintains, the Ninth Circuit seized upon baseless accusations to force re-litigation of claims that were fairly litigated and properly rejected by a racially diverse jury.

I. The Court Should Grant Plenary Review To Clarify When A Comparative-Juror Analysis Is Required On Appeal.

1. Respondents contend that review is not warranted because most *Batson* challenges arise in criminal appeals and, therefore, resolving the questions presented in this civil case would not provide meaningful guidance to the lower courts. Opp. 8–9. But respondents cite no authority establishing that *Batson* applies differently in the criminal and civil contexts. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) ("same approach" applies in both contexts). The Second Circuit has recently held that, for *Batson* purposes, there is "no principled basis for distinguishing between civil and criminal cases." *United States v. Martinez*, 621 F.3d 101, 107 (2d Cir. 2010). And the Ninth Circuit specifically noted below that it has never recognized any such distinction. Pet.App. 3 n.3.[1] A decision from this Court clarifying

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[1] The Fifth Circuit, by contrast, has distinguished the capital context from both the non-capital and civil contexts. *See supra*. Granting plenary review could resolve that subsidiary split as well. Moreover, granting review in a civil case and clarifying whether the rules apply uniformly

(i) whether comparative-juror analysis is mandatory, and (ii) whether ordinary rules of forfeiture apply would thus provide critical guidance in both the criminal and civil contexts.

To be sure, the standard of review under the Antiterrorism and Effective Death Penalty Act ("AEDPA") is more demanding than "clear error" review. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). But courts in the Ninth Circuit have held that even AEDPA's demanding standard is satisfied when a state court fails to undertake a comparative-juror analysis. *Reynoso v. Hall*, No. 08-15800, 2010 WL 3516410, at *3 (9th Cir. Sept. 7, 2010); *see also id.* at *8–9 (Callahan, J., dissenting). Moreover, that the failure to undertake comparative-juror analysis is often debated in the section 2254 context underscores that this is a rare opportunity for the Court to provide direct and definitive guidance on an important, recurring issue without couching its decision in terms of AEDPA's standard of review. If this Court decides that it is not "clear error" for the district court to fail to conduct comparative-juror analysis *sua sponte*, that will resolve the AEDPA questions, *a fortiorari*, and decide the issue once and for all.

2. Respondents next assert that comparative-juror analysis is not actually "mandatory" in the Ninth Circuit and "there is no clear rule concerning 'forfeiture.'" Opp. 9–10. But that is directly contrary to respondents' position below, where

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in civil, non-capital criminal, and capital contexts is surely a better option than reviewing *Batson* only in capital cases.

respondents argued that "comparative juror analysis is required—both on the part of the trial court ... and by reviewing courts 'even when it was not requested or attempted in the [trial] court." Resp. CA9 Reply 14 (emphasis in original). To support that position, respondents quoted the Ninth Circuit's *en banc* decision in *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006), which interpreted *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), as establishing that "comparative analysis is required even when it was not requested or attempted" before the trial court. *Kesser*, 465 F.3d at 361. Although respondents suggest that other Ninth Circuit panel decisions have struggled to apply *Kesser*, that hardly renders the *en banc* decision non-binding or Ninth Circuit law unsettled. Rather, it suggests that even some panels bound by that *en banc* decision bristle at its un-workability. Moreover, respondents' suggestion that comparative-juror analysis is a non-mandatory "tool," Opp. 10, 18 n.10, was recently rejected by another Ninth Circuit panel, which (like the court below) held that "courts must conduct comparative juror analyses when considering *Batson* objections." *Reynoso*, 2010 WL 3516410, at *3 (citing *Kesser*); *cf. id.* at *7 (Callahan, J., dissenting).

3. As the petition explains, the Ninth Circuit's extreme position directly conflicts with decisions from other courts of appeals. Pet. 18–22. Respondents seek to downplay these divisions, but they do not deny that there is widespread confusion among the lower courts. If anything, respondents' opposition indicates that the confusion is even *greater* than the petition suggested.

Respondents in any event do not fairly describe the relevant precedent. For example, respondents get the law of the Sixth Circuit backwards in narrowly construing *United States v. Cecil*, 615 F.3d 678 (6th Cir. 2010), and broadly construing *United States v. Torres-Ramos*, 536 F.3d 542 (6th Cir. 2008). Opp. 10–11 & n.6. *Cecil* clarified that *Torres-Ramos* stands only "for the simple premise that, when a district court conducts comparative juror analysis, it is under an obligation to get it right," but it need not undertake it if "neither party argues for such analysis." 615 F.3d at 687. According to the Sixth Circuit, *Miller-El II* "says nothing of a trial court's responsibility to adduce evidence when the challenging party fails to do so." *United States v. Katuramu*, Nos. 04-3633, 04-3722, 2006 WL 773038, at *3 (6th Cir. Mar. 28, 2006). In conflict with the Ninth Circuit, the Sixth Circuit thus does not view comparative-juror analysis as mandatory or exempt from ordinary rules of forfeiture.

Respondents also mischaracterize the Fifth Circuit's jurisprudence, dismissing any distinction between capital and non-capital cases as a relic of pre-*Miller-El II* authority. But *Woodward v. Epps*, 580 F.3d 318 (5th Cir. 2009), which post-dates *Miller-El II*, unambiguously distinguished civil and non-capital criminal cases from capital cases. In particular, *Woodward* reaffirmed that principles of forfeiture apply in civil and noncapital criminal cases, but noted that "[c]apital cases employ different standards ... at times" and that "waiver does not apply in capital cases." *Id.* at 338.

Respondents also rely on two other Fifth Circuit cases, *see* Opp. 15, but neither embraces the Ninth Circuit's approach. *See United States v. Williams*, 610 F.3d 271, 283 n.13 (5th Cir. 2010); *United States v. Brown*, 553 F.3d 768, 796–97 (5th Cir. 2008). In *Williams*, the court merely rejected the suggestion that, although appellant had raised a comparative-juror argument before the trial court, it had not raised the argument with sufficient specificity. 610 F.3d at 283 n.13. In *Brown*, no party appears to have argued forfeiture (and, of course, it is possible to forfeit a forfeiture argument, *see, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 459–60 (2004)). Moreover, in both cases, the Fifth Circuit rejected the *Batson* challenge and upheld the trial court.

Respondents relegate their discussion of Eleventh Circuit case law to a footnote, *see* Opp. 15–16 n.9, but that cannot obscure its conflict with the decision below. In *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), the Eleventh Circuit did not undertake a comparative-juror analysis because it concluded that *Miller-El II* controlled only in cases involving similarly "augmented record[s]" and limited its review to the "'evidence presented'" below. *Id.* at 1070 & n.6. That *Hightower* treated the comparative-juror issue as forfeited was plainly the understanding of the dissent, which criticized the majority on grounds that "comparative juror analysis is further evidence of a *Batson* violation that the trial court *could have* considered ..., *whether counsel made the argument or not.*" *Id.* at 1076 n.6 (Wilson, J., dissenting) (emphasis added).

Finally, respondents' attempt to recast *Lamon v. Boatwright*, 467 F.3d 1097 (7th Cir. 2006), is

unavailing. Opp. 13. Respondents contend that *Lamon* viewed comparative-juror analysis as "*unnecessary*," *id.*, but the relevant point is that the Seventh Circuit majority did not view comparative-juror analysis to be "required on appeal."

In short, respondents have not, and cannot, point to any consistently applied rule that harmonizes the disarray among the circuits. Unlike the Ninth Circuit below, courts in other circuits have not adopted the rule that "a comparative juror analysis is required on appeal, even when ... it was not requested or attempted below." Pet.App. 3.

4. Respondents next contend that the Ninth Circuit's decision "simply did as this Court did in *Miller-El [II]*." Opp. 17. Citing *Miller-El II*'s second footnote, respondents argue that comparative arguments were fairly presented because they were generally encompassed in "theories about th[e] evidence" presented below. Opp. 18. But respondents neglect to mention the footnote's very next paragraph, which recognized a "question" as to whether certain "juror questionnaires" and "juror information cards" were properly before the lower courts. 545 U.S. at 241 n.2 & 256 n.15. Because the materials were acquiesced to and "expressly relied on" by the state, however, the Court had "no occasion ... to reach any question about waiver." *Id.* at 256 n.15.

That the Ninth Circuit's position is out-of-step with this Court's decisions is further underscored by respondents' treatment of *Snyder v. Louisiana*, 552 U.S. 472 (2008). Respondents make the remarkable assertion that *Snyder* relied on a "'cold appellate record' ... to reverse the Louisiana trial and

supreme courts." Opp. 21. In fact, *Snyder* warned that "a retrospective comparison of jurors ... may be very misleading when ... not raised at trial" and explained that the record there was *not* a "cold appellate record" because the issue had been "*thoroughly explored* by the trial court." 552 U.S. at 483 (emphasis added).

Nothing in *Miller-El II* or *Snyder* suggests that this Court has mandated comparative-juror analysis in every case or exempted *Batson* claims from the ordinary rules of forfeiture. Indeed, this is the point recognized in Judge Rymer's dissent in *Kesser*, which contrary to respondents' suggestions, Opp. 20 n.12, squarely addresses forfeiture. Judge Rymer objected to the majority's comparative-juror analysis because "[n]o evidence was presented, no arguments were offered, [and] no findings were sought" in the trial court. 465 F.3d at 377 (Rymer, J., dissenting). As she explained, "appellate judges should not purport to undertake such a fact-intensive process," for "there is no clearly established law" requiring comparative-juror analysis to be undertaken for the first time on appeal. *Id.*

5. Respondents complain that petitioners are demanding "insatiable," "unbounded" deference to trial courts. Opp. 22. In fact, petitioners merely seek to enforce the "great deference upon appeal" that this Court has mandated in *Batson* cases. *Hernandez v. New York*, 500 U.S. 352, 364 (1991). The Ninth Circuit was able to claim "clear error" below only by fundamentally transforming the meaning of that standard. Where there were "two permissible views" of the evidence, *id.*, the Ninth Circuit insisted that its own view had to prevail.

For instance, where TG had effusively expressed positive feelings about her former employer, and noted that her former employer's workplace was multi-lingual, the Ninth Circuit concluded that it was "clear error" to put two and two together and infer that she had positive feelings about her former multi-lingual workplace. It also second-guessed the trial court's evident conclusion that petitioner's counsel merely misspoke when he mistakenly stated that TG's sister had filed a discrimination claim and then corrected himself, adding "Or not." Pet.App.50.

6. The decision below is thus not supported by "alternative and independent grounds." Opp. 24. To the extent it relies on alleged factual misrepresentations, those "errors" were found only by subverting the "clear error" standard of review. Not every mistake is evidence of racial animus, and the context and credibility that the district court was in a unique position to judge are the keys to differentiating honest mistakes from pretext.

II. The Court Should Summarily Reverse The Decision To Order A New Trial.

Respondents' opposition, accompanied as it is with 205 pages of appendix materials, confirms that the Ninth Circuit engaged in improper appellate fact-finding and that this Court should at a minimum summarily reverse its decision to vitiate the trial without remand.[2] Even assuming

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[2] Respondents quibble with the length of the trial, suggesting that it lasted only 27 days. Opp. 5. In fact, proceedings commenced on October 8, 2008, and were completed 49 days later on November 26, 2008. (The

respondents could make a *prima facie* showing of possible discrimination, the trial judge who conducted voir dire deserved the opportunity to consider the new evidence and arguments. The trial judge is in a far better position than the court of appeals to make the factual findings required to determine whether counsel purposefully discriminated.

1. Respondents assert that no remand is required because the trial court "ignored in the first instance" the "evidence" considered by the Ninth Circuit. Opp. 27, 29. But it is respondents and not the trial court that "ignored" the evidence; the whole problem here is that respondents did not bring to the judge's attention the very arguments and evidence that they now assert he overlooked. At no point before the trial court did respondents ever seek to compare TG to any other juror or raise any of the other arguments they now press in an attempt to prove up their alleged *Batson* violations. At trial, respondents objected to only two of petitioner's four race-neutral explanations for striking TG and, with respect to those two explanations, they objected on different grounds from the grounds on appeal. At no point did respondents object about counsel's mistaken (promptly corrected) comment that TG's sister had filed a discrimination claim, or his inference that TG

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petition inadvertently referred to a 52-day trial). Any way you count them, the Ninth Circuit's decision effectively rendered all those trial days—a substantial percentage of the trial court's work year—for naught, without even the courtesy of a remand.

had loved her former multi-lingual workplace. *Id.* It is hard enough to believe that comparative-juror analysis, like standing and jurisdiction but unlike everything else, can be raised for the first time on appeal. It is even harder to believe that disputes of evidence and credibility should be definitively resolved by the court of appeals without a remand to the district court who oversaw the voir dire.

2. Respondents also feign confusion over "what precisely" should "occur on remand," contending that "all of the relevant facts are known and undisputed." Opp. 27. But this is wishful thinking. Unlike the cases respondents cite, where "all the evidence" was "documentary" and the facts undisputed, *Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 118–19 (5th Cir. 2008), here the most important facts are hotly disputed and turn on real-life credibility determinations. Respondents' cases do not address the situation where, as here, the trial judge is ready, willing, and uniquely able to consider the issues on remand. *See* Opp. 29–30 & n.17 (citing *Reed v. Quarterman*, 555 F.3d 364, 382 (5th Cir. 2009) (case involving proceedings "more than thirty years after the crime took place")).

Batson's fact-intensive inquiry is supposed to allow the trial court, with its broad appreciation for the totality of circumstances, to "undertake 'a sensitive inquiry,'" *Batson*, 476 U.S. at 93, into counsel's "state of mind based on demeanor and credibility." *Hernandez*, 500 U.S. at 361, 364–65. In this case, that would require the trial judge to address the arguments and evidence that, as the Ninth Circuit admitted, respondents "did not specifically point out below." Pet.App. 3. And it

would require the trial judge to determine whether, as respondents maintain, petitioner's counsel purposefully excluded prospective jurors because of their race or whether, as petitioner maintains, there were at most some errors of fact that do not remotely give rise to an inference of pretext.

3. Respondents assert that the *Batson* violation "was apparent even in the absence" of a factual finding "regarding counsel's demeanor" and that TG's demeanor is irrelevant. Opp. 28. But that is not true. Whether counsel's stated reasons for striking TG were "supported by the record" and, if not, whether they were sufficient to justify an "inference" of discriminatory pretext cannot be resolved on a cold appellate record with no appreciation for counsel's credibility and TG's demeanor.

The accusation that an officer of the court has acted with purposeful discrimination deserves serious consideration by the trial court, which is ideally situated to consider it. In this case, where respondents' discrimination claims were rejected by a racially diverse jury, it is unsurprising that they seek a complete do-over rather than a proper remand. Ordering a remand is therefore all the more critical to ensuring that *Batson* is not transformed into a strategic weapon to be used anytime a plaintiff or court of appeals is disappointed by a jury's verdict.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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